UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

STATE OF MISSOURI, *ex rel.* JOSHUA D. HAWLEY,	)	
Plaintiff,	)	
	)	Case No. 6:18-cv-03293-MDH
v.	)	
BRANSON DUCK VEHICLES, LLC, *et al*.	)	
Defendants.	)	

SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

The central argument in Defendants' motion to dismiss is that the Attorney General's Petition addresses only the safety regulation of duck boats, not unfair merchandising practices. *See* Doc. 8, at 10-15. This contention is demonstrably erroneous. Defendants mischaracterize the Petition by selectively overlooking every single allegation of false, fraudulent, deceptive, and misleading conduct in the Petition. For example, the Petition alleges that the Defendants engaged in a fraudulent and misleading advertising campaign that misrepresented the safety of duck boats to their customers and the public, and materially omitted the known risks of duck boats. *See* Doc. 1-1, ¶¶ 30-37; *see also id.* ¶¶ 11-27 (describing the known hazards of duck boat operations). The Petition alleges that Defendants' advertising campaign targeted populations who were particularly vulnerable to injury and death in duck boats—such as the elderly, the disabled, and small children—by deceiving their customers into believing that duck boats were particularly *safe* for those vulnerable populations. *Id.* ¶¶ 33-38.

Similarly, the Petition alleges that Defendants' advertisements about the manufacturing history and marine safety of Stretch Duck #7 were false and misleading. For example, they claimed that the boat "resemble[s] the WWII DUKW in appearance only" and was "built, exclusively for us, from the ground up, using the latest in marine safety"—when, in fact, Stretch Duck #7 was "actually manufactured as an original DUKW" during World War II. *Id.* ¶¶ 39-40. The Petition alleges that Defendants' public representation that Stretch Duck #7 reflected the "latest in marine safety" was false, fraudulent, and misleading, because Defendants had failed to address a long series of known hazards and ignored repeated recommendations for the improvement to the safety of their duck boats, including Stretch Duck #7. *Id.* ¶¶ 39-56.

The Petition also alleges false and fraudulent conduct, material omissions, and unfair trade practices in connection with the operation of Stretch Duck #7 during the violent thunderstorm on July 19, 2018. For example, the Petition alleges that Defendants adopted a refund policy that gave them a financial incentive to operate the duck boats on the water in hazardous conditions, as they did on that fatal day. *Id.* ¶¶ 66-67. The Petition alleges that the Defendants' decision to send duck boats onto the water in known hazardous weather conditions was motivated by their desire to avoid having to pay a refund of ticket prices to passengers that day. *Id.* ¶¶ 71-74, 82. The Petition alleges that Defendants engaged in an unfair trade practice by failing to disclose to their customers that they were hurrying the duck boats onto Table Rock Lake in life-threatening conditions to avoid having to refund that day's ticket prices. *Id.* The Petition alleges that Defendants engaged in fraudulent conduct, material omissions, and unfair trade practices by failing to notify customers that the duck boat could not be safely operated on the water during the dangerous weather conditions that day. *Id.* ¶¶ 65-66. The Petition alleges that the Defendants made false and misleading representations to the passengers of Stretch Duck #7 by failing to advise them that life jackets were required for safety, and in fact by advising them, falsely, that life jackets would *not* be required for safety. *Id.* ¶¶ 93-98.

In short, the Attorney General's Petition focuses on the Defendants' egregiously fraudulent, misleading, and deceptive trade practices that led directly to the deaths of seventeen people, including five children and seven senior citizens. *Id.* ¶ 75. In committing such outrageous actions of deceit, misleading statements, fraudulent concealment, and unfair trade practices in connection with commercial operations, Defendants are not subject to the regulation and oversight of the U.S. Coast Guard. Their misconduct is regulated by the Missouri Merchandising Practices Act and subject to the oversight of the Missouri Attorney General.

STANDARD OF REVIEW

When considering a motion to dismiss under Rule 12(b)(6), the Court must accept all allegations in the complaint as true and "must draw all reasonable inferences in favor of [the plaintiff]." *Kelly v. City of Omaha*, 813 F.3d 1070, 1075 (8th Cir. 2016).[1] Here, Defendants' Motion to Dismiss relies entirely on the affirmative defense of federal preemption. *See* Doc. 8. "A court may dismiss a claim under Rule 12(b)(6) on the basis of an affirmative defense only if the 'affirmative defense is apparent on the face of the complaint.'" *Christenson v. Freeman Health Sys.*, 71 F. Supp. 3d 964, 967 (W.D. Mo. 2014) (quoting *C.H. Worldwide, Inc. v. Lobrano*, 695 F.3d 758, 764 (8th Cir. 2012)). For that reason, dismissal under Rule 12(b)(6) based on an affirmative defense is "relatively rare." *Goodman v. Praxair, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (en banc).

ARGUMENT

The Court should deny Defendants' Motion, without reaching the merits, because the Court lacks subject-matter jurisdiction over this improperly removed case. Even if the Court were to reach the merits of Defendants' Motion, the Court should deny that Motion. Defendants' Motion to Dismiss relies exclusively on the contention that Coast Guard regulations preempt the State's claims under the Missouri Merchandising Practices Act ("MMPA"). *See* Doc. 8, at pp. 6-14. Here, the State's MMPA claims do not fall within the scope of 46 C.F.R. § 175.100's express-preemption provision, and neither field preemption nor conflict preemption apply to the State's claims. Thus, the State's claims are not preempted.

[1] Defendants' brief includes a lengthy facts section that attempts to import numerous highly tendentious factual claims that plainly do not appear in the State's Petition. *See* Doc. 8, at pp. 1-4. The Court should entirely disregard this spurious section, which is both factually erroneous and manifestly improper in the context of a motion to dismiss under Rule 12(b)(6).

I. Because Defendants Improperly Removed This Case and the Court Lacks Subject-Matter Jurisdiction, the Court Should Deny the Motion to Dismiss.

For the reasons stated in the State's Suggestion in Support of Motion for Remand, removal of this case to federal court was improper because the Court lacks subject-matter jurisdiction. Where "removal to federal court was improper," "the district court lack[s] jurisdiction to do anything other than remand [the case] to state court." *Dennis v. Hart*, 724 F.3d 1249, 1255 (9th Cir. 2013) (vacating order of partial dismissal when the district court lacked subject-matter jurisdiction); *see also Carlson v. Arrowhead Concrete Works, Inc.*, 445 F.3d 1046, 1052 (8th Cir. 2006) ("Any order remanding a matter to state court for lack of subject matter jurisdiction necessarily denies all other pending motions." (quotation omitted)). Thus, the Court should deny Defendants' Motion to Dismiss.

II. If the Court Reaches the Merits of Defendants' Motion, the Court Should Deny the Motion, Because the State's Claims Are Not Preempted.

Defendants' Motion to Dismiss argues principally that 46 C.F.R. § 175.100 expressly preempts the State's MMPA claims. Defendants also appear to argue in passing that the field-preemption and conflict-preemption doctrines bar the State's claims. All of these arguments are meritless. The Court should deny the Motion to Dismiss.

A. 46 C.F.R. § 175.100 Does Not Expressly Preempt the State's MMPA Claims.

Defendants contend that 46 C.F.R. § 175.100 expressly preempts the MMPA claims brought by the State in this case. *See* Doc. 8, pp. 6-14. A federal agency acting within the scope of its congressionally delegated authority may promulgate regulations that preempt state law. *See, e.g.*, *See Fidelity Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-53 (1982). Here, the Coast Guard—a component of the Department of Homeland Security—has promulgated a

regulation providing that "[t]he regulations in [Subchapter T of Title 46] have preemptive effect over State or local *regulations in the same field*." 46 C.F.R. § 175.100 (emphasis added).

"When a federal law contains an express preemption clause, [courts] focus on the plain wording of the clause, which provides the best evidence of [federal] preemptive intent." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011) (quotation omitted). Thus, whether § 175.100 preempts the State's statutory MMPA claims depends on interpretation the text of that regulation. *Id.* Here, § 175.100 does not preempt the State's MMPA claims, because the MMPA is not "in the same field" as the Coast Guard's regulations in Subchapter T, and because the MMPA is not a "regulation" within the meaning of § 175.100. The Court should deny the Motion to Dismiss.

1. The MMPA is not "in the same field" as the Coast Guard's regulations in Subchapter T, and thus § 175.100 does not preempt the State's MMPA claims.

The plain text of § 175.100 demonstrates that it preempts only those state regulations "in the same field" as the regulations set forth in Subchapter T of Title 46. 46 C.F.R. § 175.100; *see also Chamber of Commerce*, 563 U.S. at 594 (explaining that the plain text of the preemption provision governs in express-preemption cases). Several factors here demonstrate that the MMPA is not "in the same field" and thus is not preempted by § 175.100.

First, the MMPA regulates different matters than do the Coast Guard regulations. The MMPA regulates conduct that occurs "in connection with the sale or advertisement of any merchandise." Mo. Rev. Stat. § 407.020.1.[2] The MMPA imposes regulations on a seller's conduct that induces a buyer to enter into a transaction, to make payments as part of a transaction, and to remain in a commercial relationship. *Conway v. CitiMortgage, Inc.*, 438 S.W.3d 410, 414 (Mo.

[2] The MMPA defines "merchandise" broadly to include "any objects, wares, goods, commodities, intangibles, real estate or services." Mo. Rev. Stat. § 407.010(4).

banc 2014). For example, in this case, the State's MMPA claims focus heavily on Defendants' marketing and the representations—or lack thereof—that Defendants made to consumers, especially to uniquely vulnerable populations like children, the disabled, and the elderly, whom Defendants specifically targeted. *See, e.g.*, Doc. 1-1 ¶¶ 11-27, 30-38, 39-56, 65-67, 71-74, 82, 93-98. As relevant here, the MMPA does not impose any limitations on what products consumers may buy or the characteristics of the merchandise that consumers purchase. *See* Mo. Rev. Stat. § 407.020.1. The MMPA regulates the *sale*, not the *product sold*. *Id.*

In contrast, the Coast Guard's regulations dictate the characteristics of Defendants' merchandise, that is, the operations and characteristics of Defendants' vessels. The Coast Guard regulates the inspection and certification of Defendants' vessels (Part 176); their construction and equipment (Parts 177, 182, 183, 184); their seaworthiness and stability (Parts 178 and 179); their emergency safety capabilities (Parts 180 and 181); and their operations (Part 185). But none of the Coast Guard's regulations addresses the sale or advertisement of rides on small passenger vessels. *See generally* Title 46 C.F.R. Chapter I, Subchapter T; *see also* 77 Fed. Reg. 33860, 33869 (June 7, 2012) (cited by Defendants, Doc. 8, at p. 9) (identifying the categories of regulation preempted by Coast Guard regulations as "design, construction, alteration, repair, maintenance, operation, equipping, personnel qualification, and manning of vessels"). Thus, unlike the MMPA, the Coast Guard's regulations regulate the *product sold*, not the *sale itself*. *See id.* As a result, the MMPA and the Coast Guard regulations address different matters: the MMPA regulates the sale or transaction; the Coast Guard regulates the product sold. The MMPA and the Coast Guard regulations do not operate "in the same field."

Second, the MMPA serves significantly different purposes than do the Coast Guard regulations. The purpose of the MMPA is to "preserve fundamental honesty, fair play and right

dealings in public transactions." *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721, 724 (Mo. banc 2009). The statute implements the "state's goal of securing an honest marketplace in which to transact business." *State of Missouri ex rel. Webster v. Freedom Fin. Corp.*, 727 F. Supp. 1313, 1317 (W.D. Mo. 1989). In contrast, Subchapter T operates to implement the requirements relating to "the inspection and certification of small passenger vessels" imposed by 46 U.S.C. Subtitle II. 46 C.F.R. § 175.100. Subtitle II prescribes that the inspection and certification process should:

> ensure that a vessel subject to inspection—(A) is of a structure suitable for the service in which it is to be employed; (B) is equipped with proper appliances for lifesaving, fire prevention, and firefighting; (C) has suitable accommodations for the crew, sailing school instructors, and sailing school students, and for passengers on the vessel if authorized to carry passengers; (D) has an adequate supply of potable water for drinking and washing by passengers and crew; (E) is in a condition to be operated with safety to life and property; and (F) complies with applicable marine safety laws and regulations.

46 U.S.C. § 3305(a)(1). Tellingly, none of these statutory purposes—all of which involve maritime safety and operations—relates to preserve honest and fair markets. *Id.* Even where the Coast Guard has issued comprehensive vessel design and safety regulations, the Supreme Court has recognized that those regulations would not preempt non-discriminatory state and local laws that serve distinct purposes, such as conservation. *See Ray v. Atl. Richfield Co.*, 435 U.S. 151, 164 (1978). Because the MMPA serves significantly different purposes than do the Coast Guard regulations, the two provisions of law do not operate "in the same field."

Third, to the extent that there is any uncertainty whether § 175.100 preempts the MMPA, the Court should construe the regulation against preemption. Federal courts are very reluctant to find that federal law has preempted state regulation in an area of traditional state concern. *See, e.g., Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005). Consumer-protection and

unfair-business-practice statutes are squarely within the State's traditional regulatory and police powers. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989); *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir. 1990). Thus, to the extent that there is any uncertainty or ambiguity whether § 175.100 preempts the MMPA, the Court should construe the regulation against preemption. In particular, the Court should conclude that the MMPA is not "in the same field" as the Coast Guard's regulations set forth in Subchapter T.

For the reasons stated, the MMPA does not operate "in the same field" as Subchapter T and thus does not fall within the scope of § 175.100's express-preemption provision.

2. The MMPA does not constitute a "regulation" within the meaning of § 175.100 and thus does not fall within the scope of § 175.100's express-preemption provision.

The plain text of 46 C.F.R. § 175.100 expressly limits its preemptive effect to "State or local *regulations*." 46 C.F.R. § 175.100 (emphasis added). For the reasons stated below, in the context of § 175.100, the term "regulation" applies only to enactments by executive-branch administrative agencies, not to legislatively enacted statutes. Because the MMPA is a statute enacted by Missouri's Legislative Branch, the MMPA does not constitute a "regulation" within the meaning of § 175.100.

First, the ordinary and natural meaning of "regulation" encompasses only enactments by executive branch administrative agencies, not legislatively enacted statutes. "A . . . 'regulation' is the whole or a part of *an administrative agency* statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements *of an administrative agency*." 73 C.J.S. Public Administrative Law & Procedure § 212 (emphases added). Consistent with this ordinary and natural understanding, courts generally find the term "regulation" to denote executive branch

administrative rules. *See, e.g.*, *Allen v. Bd. of Cty. Commissioners*, No. 90-2059, 1990 WL 254978, at *2 n.3 (D. Kan. Dec. 7, 1990) ("[A] regulation is a rule or order having force of law issued by executive authority of government." (quotation omitted)); *United States v. $200,000 in U.S. Currency*, 590 F. Supp. 866, 869 (S.D. Fla. 1984) ("[A] 'regulation' is the product of administrative legislation."); *Snow v. Ruden, McClosky, Smith, Schuster & Russell, P.A.*, 896 So. 2d 787, 791 (Fla. App. 2005) ("A regulation is synonymous to a rule enacted pursuant to the administrative law process; a rule or regulation comes into being as a result of a legislative grant of authority to an executive branch department or agency."). Thus, the plain language of § 175.100 indicates that the regulation preempts only executive branch administrative rules, not statutes.

Second, the Coast Guard's consistent use of the terms "regulation" and "statute" throughout Title 46 confirms that the Coast Guard does not intend "regulation" to include "statutes." When interpreting regulations, courts generally apply ordinary rules of statutory interpretation. *See Northshore Mining Co. v. Secretary of Labor*, 709 F.3d 706, 709 (8th Cir. 2013). Among these ordinary rules of statutory interpretation, "[t]here is a presumption that Congress uses the same term consistently in different statutes." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 857 (D.C. Cir. 2006); *see also, e.g.*, *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (explaining that courts presume that "a legislative body generally uses a particular word with a consistent meaning in a given context"). Thus, the Coast Guard's consistent use of the terms "regulation" and "statute" in other portions of Title 46 provides strong evidence of the meaning of the term "regulation" in § 175.100. *Id.*

The Coast Guard's regulations consistently distinguish between "regulations" and "statutes." In numerous provisions of Title 46, the Coast Guard refers in the same provision to both "regulations" and "statutes." *See, e.g.*, 46 C.F.R. §§ 5.27 ("Such rules are found in, among

other places, *statutes*, *regulations*, the common law"); 5.33 ("the complaint must state the specific statute *or* regulation"); 5.71 ("when a violation of existing statutes *or* regulations is indicated"); 8.550 ("when statutes *or* regulations change"); 71.25-10 ("comply with the requirements of the applicable statutes *and* regulations"); 131.905(b) ("violating maritime-safety statutes *or* regulations"); 189.20-10(a) ("comply with all applicable statutes *and* regulations"); 189.20-15(a) ("as required by all applicable statutes *and* regulations").

If statutes were to fall within the scope of the term "regulations," then the Coast Guard's repeated uses of the noun "statutes" in these regulations would be superfluous. *See id.* Courts avoid interpreting regulations in a way that renders any portion of the text superfluous. *See Solis v. Summit Contractors, Inc.*, 558 F.3d 815, 823 (8th Cir. 2009). Thus, as used in these regulations, the term "regulation" does not include statutes. *Id.* And because the Court presumes that the Coast Guard has used the term "regulation" consistently throughout Title 46, the term "regulation," as used in § 175.100, similarly does not include statutes. *Nat'l Treasury Employees*, 452 F.3d at 857; *Erlenbaugh*, 409 U.S. at 243.

Moreover, when the Coast Guard does intend to refer to state statutes, it uses the term "statute," not the term "regulation." In defining the term "acknowledgement," the Coast Guard includes "[a]n acknowledgment or notarization in any form which is in substantial compliance with . . . *the statutes* of the State in which it is taken." 46 C.F.R. § 67.3 (emphasis added). Thus, the Coast Guard knows how to refer clearly to state statutes when it desires to do so. *See id.* The fact that the Coast Guard opted not to include similar language in § 175.100 strongly indicates that it did not intend to include state statutes within the scope of § 175.100's preemption provision. *See, e.g., United States v. Lachowski*, 405 F.3d 696, 700 (8th Cir. 2005); *MM&S Fin., Inc. v. Nat'l Ass'n of Secs. Dealers, Inc.*, 364 F.3d 908, 911 (8th Cir. 2004); *see also JBLU, Inc. v. United*

States, 813 F.3d 1377, 1382 (Fed. Cir. 2016) (applying this principle in interpretation of administrative regulations).

Third, to the extent that the term "regulation" is ambiguous, the Court should construe the term narrowly—consistent with the term's ordinary meaning and the Coast Guard's consistent usage—to include only executive branch administrative rules. As noted above, federal courts are very reluctant to find that federal law has preempted state regulation in an area of traditional state concern. *See, e.g.*, *Wuebker*, 418 F.3d at 887. Consumer-protection and unfair-business-practice statutes are squarely within the State's traditional regulatory and police powers. *See, e.g.*, *California v. ARC Am. Corp.*, 490 U.S. at 101; *Abrams*, 897 F.2d at 41-42. Thus, to the extent that it is ambiguous whether § 175.100 preempts state consumer-protection laws, the Court should construe the preemption provision narrowly to find that it does not preempt the MMPA.

For the foregoing reasons, the term "regulation" in § 175.100 includes only executive branch administrative rules, not legislatively enacted statutes. The State has brought all of its causes of action under the MMPA, in particular, Mo. Rev. Stat. § 407.100. Doc. 1-1. Section 407.100 was enacted by the Missouri General Assembly, not by an administrative agency. *See* Mo. Rev. Stat. § 407.100. Thus, by its own terms, 46 C.F.R. § 175.100 does not purport to preempt § 407.100. *See* 46 C.F.R. § 175.100. The Court should deny Defendants' Motion to Dismiss.

B. Because the MMPA is not in the same field as the Coast Guard's regulations, the doctrine of implied field preemption does not bar the State's claims.

Under the doctrine of field preemption, federal law can "foreclose any state regulation in [an] area, even if it is parallel to federal standards." *Arizona v. United States*, 567 U.S. 387, 401 (2012). "Field preemption exists where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *In re Aurora*

Dairy Corp. Organic Milk Litig., 621 F.3d 781, 793 (8th Cir. 2010). Here, field preemption does not bar the State's claims.

First, as described above, the MMPA does not operate in the same field as do the Coast Guard regulations. *See* Part II.A.1, *supra*. The MMPA is a generally applicable consumer-protection statute that prohibits deceptive, fraudulent, unfair, and otherwise unscrupulous business practices. *See* Mo. Rev. Stat. § 407.020. In contrast, the Coast Guard regulations—and the statutory provisions of Title 46 that those regulations implement—relate solely to the fields of maritime safety and operations. *See generally* Title 46, U.S.C.; Title 46, C.F.R. Where a state law does not operate in the field that federal law has entirely occupied, field preemption does not apply. *See, e.g., CardioVention, Inc. v. Medtronic, Inc.*, 430 F. Supp. 2d 933, 939 (D. Minn. 2006). For example, while the federal patent statutes preempt the field of patent law, they do not ordinarily preempt state unfair-competition laws. *Hunter Douglas, Inc. v. Harmonic Design, Inc.*, 153 F.3d 1318, 1333-34 (Fed. Cir. 1998), *overturned on other grounds by Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356 (Fed. Cir. 1999) (en banc). "Title 35 occupies the field of patent law, not commercial law between buyers and sellers." *Id.* at 1334 (quotation omitted). Similarly, here, the Coast Guard regulations occupy the fields of maritime safety and operations, "not commercial law between buyers and sellers." *Id.* That latter field is regulated by state law, in particular, the MMPA. Because the MMPA and the Coast Guard regulations operate in different fields, field preemption does not apply. *CardioVention*, 430 F. Supp. 2d at 939.

Second, as described above, the MMPA serves substantially different purposes than do Title 46 of the United States Code and the Coast Guard regulations. When determining whether field preemption applies, the Court may compare the purposes of the state and federal laws at issue. *In re Aurora Dairy*, 621 F.3d at 793. As described above, the MMPA serves substantially different

purposes than do the federal statutes and regulations cited by Defendants. *See* Part II.A.1, *supra*. The MMPA exists to protect Missouri consumers from fraudulent, deceptive, and unfair commercial conduct. *See Huch*, 290 S.W.3d at 724. The federal laws at issue serve to regulate maritime safety and operations. *See generally* Title 46 U.S.C.; Title 46 C.F.R. These markedly different purposes provide strong evidence that field preemption does not apply. Indeed, the Supreme Court has recognized that Coast Guard maritime regulations would not preempt non-discriminatory state and local laws that serve distinct purposes, such as conservation. *See Ray*, 435 U.S. at 164.

The MMPA's purposes also distinguish the Supreme Court cases cited by Defendants. In *United States v. Locke*, the Court considered state statutes that imposed direct regulatory requirements on areas of core maritime safety, including minimum qualifications for maritime crew members and the ways in which vessels could navigate. 529 U.S. 89, 112-16 (2000). Similarly, *Kelly v. State of Washington* involved a challenge to "a comprehensive and complete code for the inspection and regulation of every vessel operated by machinery which is not subject to inspection under the laws of the United States." 302 U.S. 1, 4 (1937). Thus, in both cases, the state statutes at issue had the express purpose of regulating maritime safety and operations—precisely the purpose served and field occupied by the relevant federal laws. Because the MMPA operates to regulate the commercial relationship between buyers and sellers—most notably the representations made by sellers to induce buyers to purchase merchandise—it stands in stark contrast to the statutes at issue in *Locke* and *Kelly*.

Third, courts presume that federal law does not field preempt state laws that operate in fields of traditional state concern. "[C]ourts are to start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and

manifest purpose of Congress, particularly in those cases in which Congress has legislated in a field which the States have traditionally occupied." *In re Aurora Dairy*, 621 F.3d at 793-94 (applying field-preemption analysis) (quotation, brackets, and ellipsis omitted). "Consumer protection is quintessentially a field which the states have traditionally occupied." *Id.* at 794 (quotation omitted). The MMPA is a core consumer-protection statute, and thus there is a strong presumption that federal law does not field-preempt the MMPA. *Id.* (refusing to find field preemption of state consumer-protection statute). For the foregoing reasons, the doctrine of field preemption does not bar the State's claims.

C. The doctrine of conflict preemption does not bar the State's claims.

"Conflict preemption exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." *In re Aurora Dairy*, 621 F.3d at 794 (quotation omitted). Here, Defendants have not explained how compliance with the MMPA would make it "impossible" for them also to comply with the Coast Guard regulations. *See generally* Doc. 8. Indeed, to the extent that the State's claims implicate federal law at all, the State demands that Defendants comply with all applicable Coast Guard regulations. *See, e.g.*, Doc. 1-1, at pp. 19, 23.

Defendants also have not explained how the MMPA "pose[s] an obstacle to the accomplishment of congressional objectives." *In re Aurora Dairy*, 621 F.3d at 794 (quotation omitted). The MMPA operates to ensure that Defendants accurately characterize their products to consumers, that Defendants not take unscrupulous steps to coerce consumers into commercial transactions, and that Defendants provide consumers with the products Defendants have promised. *See* Mo. Rev. Stat. § 407.020. These fundamental consumer-protection aims cannot possibly undermine the maritime safety and operations purposes served by the federal regulatory regime.

The MMPA does not conflict with federal law, and conflict preemption does not apply. The Court should deny the Motion to Dismiss.

CONCLUSION

For the reasons stated, the Court should deny Defendants' Motion to Dismiss, Doc. 7.

/s/ D. John Sauer
D. John Sauer, Mo. Bar No. 58721
First Assistant and State Solicitor
Michael Martinich-Sauter, Mo. Bar No. 66065
General Counsel and Director of Policy
Amy Haywood, Mo. Bar No. 66555
Chief Counsel, Consumer Protection
Natalie Warner, Mo. Bar No. 56712
Assistant Attorney General
Missouri Attorney General's Office
207 W. High Street
P.O. Box 899
Jefferson City, Missouri 65102
(573) 751-8145 (telephone)
(573) 751-0774 (facsimile)
John.sauer@ago.mo.gov
Michael.martinich-sauter@ago.mo.gov

Counsel for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served on all counsel of record by operation of the Court's electronic filing system on September 24, 2018.

/s/ D. John Sauer